No. 6014

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

H. P. BROWN,

Appellant,

vs.

W. J. FITZGERALD, Sheriff of the City and County of San Francisco, State of California, and W. A. HAMM, Sheriff of the County of Grays Harbor, State of Washington,

Appellees.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL BRIEF FOR APPELLANT

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PAUL P. O'BRIEN,
CLERK

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SUPPLEMENTAL BRIEF FOR APPELLANT

In some jurisdictions it is held that in extradition cases if it appears an indictment charging a crime has been returned in the demanding state, this will be sufficient and no further examination of the sufficiency of the indictment will be permitted. We need not discuss these cases nor the soundness of the rule. The Supreme Court of the State of Washington, the highest court of the demanding state, has held, and the Supreme Court of the United States has held, as will appear from the decisions hereinafter referred to, that in cases of this character the reviewing court

should and must examine the indictment upon which the application for extradition is based, and determine whether it states an offense under the laws of the demanding state, and it is to this question our argument will be directed.

It was decided in the State of Washington long ago in a lengthy and well considered case that upon an application for habeas corpus to obtain a discharge from arrest upon a warrant issued in extradition proceedings, the courts are authorized to inquire into the sufficiency of the indictment found in the demanding state, upon which the executive authority of that state has based his requisition.

Armstrong v. Van De Vanter, 21 Wash. 682.

This question was re-examined and the rule adopted in *Armstrong v. Van De Vanter* affirmed in a much later case, the Supreme Court saying, "it is not only the right, but the duty of the court to examine the indictment and determine whether the accused is substantially charged with the commission of a crime against the laws of the state to which he is sought to be returned."

In re Rudebeck, 95 Wash. 433.

The authorities on this question, supporting the view taken by our Supreme Court, are found collected in notes to

Re Waterman, 11 L.R.A. (N.S.) 424, and in Same Case, 13 Ann. Cas. 926.

In a case before the Supreme Court of the United States the same view was taken, the Court saying:

"The first of these prerequisites [insufficiency of the indictment] is a question of law and is

always open on the face of the papers to judicial inquiry on an application for a writ of habeas corpus."

Roberts v. Reilly, 116 U. S. 80;

See Rose's Notes to this case, 13 Rose's Notes U. S. Dec. 168.

Sec. 3263 Rem. Comp. Stat. was enacted as a part of the State Banking Law, and by its terms is limited in its application to banks and their officers and employees, and should not be extended by construction to include persons having no official connection therewith.

State v. Furth, 82 Wash. 665;
State v. Jaeger, 63 Mo. 403;
State v. Pierson, 101 Wash. 318;
U. S. v. Dooley, 11 Fed. (2nd) 428;
Shaw v. U. S., 292 Fed. 339;
Harper v. U. S., 170 Fed. 393;
Huntworth v. Tanner, 87 Wash. 670.

Where a statute creates a felony, and annexes a punishment *common to all persons who may be guilty of the offense*, those aiding and abetting in the perpetration of the offense may be indicted, but where the crime *is limited to a class*, only those falling within its terms are subject to prosecution.

State v. Furth, supra;
Frey v. Comm., 83 Ky. 190;
Comm. v. Carter (Ky.) 23 S. W. Rep. 344;
Mitchell v. State (Tex.) 30 S. W. Rep. 810.

"Where a statute defining an offense, designated one class of persons as subject to its penalties, all other persons not mentioned were to be deemed as exonerated."

State v .Jaeger, 63 Mo. 403;
Howell v. Stewart, 54 Mo. 406.

"There can be no doubt of the correctness of the rule that, in statutory offenses, where the plain intent of the statute is to inflict punishment only on the person actually committing the offense, others cannot be brought within its provisions as principals upon proof merely that they were aiders and abettors."

Comm. v. Sinclair (Mass.) 80 N. E. Rep. 799.

"Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence."

State v. Anderson, 61 Wash. 674;
State v. Furth, supra;
State v. Eden, 92 Wash. 1.

"Unless the language of the statute makes the conduct of the appellant criminal, there can be no recourse to the intention of the act to establish its interpretation. Though conduct may be within the reason of an act and the mischief to be remedied thereby, yet it cannot be punished as a crime if not so denominated by the statute."

State v. Hoffman, 110 Wash. 82.

Under a statute making it a criminal offense for any officer, agent or employee of "any Federal Reserve Bank or any member bank" to make false entries in the books of the bank, an indictment which fails to allege that the bank was a Federal Reserve Bank or a

member bank is fatally defective, and it is not sufficient to allege that it was a national bank.

State v. U. S., supra;
U. S. v. Dooley, supra;
State v. Johnson (S. Car.) 146 S. E. Rep. 657.

"The rule for the construction of penal statutes is, that they are to reach no further than their words, and a person is not to be made subject to them by implication."

State v. Eberhart, 106 Wash. 225;
State v. Hart, 136 Wash. 278.

"Whenever an offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective in *substance;* for lacking such allegation, all alleged may be true, and accused be innocent."

U. S. v. Woods, 224 Fed. 278.

"As a general rule, no doubt, it is sufficient to charge a statutory crime in the language of the statute; but this is only true where the words in themselves fully, directly and expressly, without any ambiguity or uncertainty, set forth all the elements necessary to constitute the offense intended to be punished."

Kubo v. U. S., 31 Fed. (2nd) 88 (9th Cir.);
U. S. v. Carll, 105 U. S. 611.

"It is also a cardinal rule of criminal pleading that an indictment for an offense must allege directly and with certainty every essential element or ingredient of the offense and not by way

of recital or inference; that it is not sufficient to allege it in the words of the statute unless those words of themselves set forth clearly, fully, and with certainty every essential ingredient of which the offense consists."

U. S .v. Carney, 228 Fed. 163.

"If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

U. S. v. Reese, 92 U. S. 214.

CONCLUSIONS

In an extradition case the court is not limited by the fact that an indictment has been filed in the courts of the demanding state but it should and must examine the indictment for the purpose of determining whether a crime is charged. Mere technical defects or loose or careless pleading will be disregarded and if *all the substantial elements* of the offense charged are pleaded the indictment is sufficient. On the other hand, *if any substantial element is lacking* extradition should be denied and the petitioner discharged from custody. Generally, in charging statutory offenses it is sufficient to plead in the words of the statute, but this is true only where the statute itself, with clearness and certainty, sets forth and defines all the essential elements of the offense. And if the statute by its terms is limited to a certain class or to a certain purpose, it must expressly appear from the face of the indictment, that the defendant charged belongs to that class or has been guilty of committing the inhibited act. In this connection, the rule that penal statutes be strictly construed, should be rigorously applied, and the class limited or the purpose limited should not be extended by inference or intendment to include other persons or other purposes. This was the view expressed by Lord Mansfield at an early date. *Browning v. Morris*, Cowpers Rep. 790, and has been followed and adopted by the Supreme Court of Washington, *State v. Eberhart*, 106 Wash. 225; *State v. Hart*, 136 Wash. 278.

Tested by these rules, the indictment involved in

this proceeding, fails to charge the petitioner with any offense against the laws of the State of Washington, and, consequently, he is entitled to his discharge.

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